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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91189629
Party	Plaintiff Borghese Trademarks Inc.
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Attachments	Opposer's Reply in Support of Its Motion to Strike.pdf (4 pages)(192250 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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Borghese Trademarks, Inc.

Opposition No.: 91189629

Opposer,

Mark: PRINCE LORENZO
BORGHESE'S LA DOLCE VITA

v.

Application No.: 77/435,171

Multi Media Exposure, Inc.

Applicant.

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**OPPOSER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE EXHIBITS C & D
OF 2ND APICELLA DECLARATION**

Opposer, Borghese Trademarks, Inc. ("Opposer"), respectfully moves the Board for leave to file a reply brief in support of its Motion to Strike Exhibits C & D of 2nd Apicella Declaration.

Opposer's Motion Complies with 37 CFR 2.127(a)

Trademark Rule 2.127(a) "does not require briefs on motions to include a table of contents, index of cases, description of record, statement of the issues, recitation of the facts, argument, and summary. However, if any of the above are included, they are counted as part of the stated page limit." *Cooper Technologies Co. v. Denier Electric Co.*, 89 USPQ2d 1478, 1479 Footnote 1 (2008) citing *Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 72 F.R. 42242, 42256 (Aug. 1, 2007) (Comments on briefing of motions). Therefore, Opposer's motion to strike is in compliance with the Trademark Rules as clarified by the Board. Furthermore, Opposer's motion was not "buried" as claimed by Applicant. "Buried" implies an attempt by Opposer to not be forthright and transparent. On the contrary, Opposer included its Motion to Strike in the appropriate place in its Reply in Support of its Motion for Summary

Judgment—as it is allowed to do under the rules—and included specific reference to its Motion to Strike in both the heading and conclusion.

Exhibits C & D were not properly authenticated and are not relevant

“The element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet.” TMEP 528.05(e). “... Materials which are not self-authenticating in nature, may nonetheless be admissible as evidence in connection with a summary judgment motion, if competent and relevant, provided they are properly authenticated by an affidavit or declaration pursuant to Fed. R. Civ. P. 56(e).” Id.

The Internet printouts in Exhibits C & D were not properly authenticated. Nowhere in the 2nd Declaration of Jolie Apicella did Ms. Apicella state who downloaded the information from the Internet, where the information was obtained from, on what date it was downloaded, nor what its relevance is to the matter at issue. The 2nd Apicella Declaration did not assert personal knowledge of anything other than the fact that Ms. Apicella attached documents to her declaration.

Further, as stated in the rules, materials which are not self-authenticating must not only be authenticated, but must also be “competent and relevant.” Neither Exhibit C nor Exhibit D are relevant. The Internet references in Exhibit C are for unrelated goods without any evidence as to ownership or source. The Internet references in Exhibit D are two trademark registrations owned by the same entity for unrelated goods. In fact, Applicant admitted these materials were irrelevant, stating in its response to Opposer’s cross motion for summary judgment (to which the 2nd Apicella Declaration was submitted in support) that “the existence or not of third-party registrations, for marks that are neither at issue here nor similar to the marks at issue, is immaterial.” (See *Applicant’s Memorandum of Law in Opposition to Opposer’s Motion for*

Summary Judgment, pg. 6).

The Internet printouts submitted as Exhibits C and D with the 2nd Apicella Declaration should be stricken based on the fact that they were not properly authenticated and are not relevant to the present matter.

Exhibits C and D are hearsay and must be stricken

Exhibits C and D should also be stricken on hearsay grounds because they were presented for the truth of the matters contained therein and not simply for what they show on their face. In its Memorandum of Law in Opposition to Opposer's Motion for Summary Judgment, Applicant stated "there are many brands using the 'Borghese' name, some of which are federally registered trademarks...(2nd Apicella Decl., ¶¶5,6, Exs. C,D)." (See *Applicant's Memorandum of Law in Opposition to Opposer's Motion for Summary Judgment*, pg. 2). Nothing in the Internet printouts submitted as Exhibits C and D indicate that the unrelated products shown are presently in use. One printout appears to be from a UK website and is dated 2006, and the newspaper articles have no dates on them whatsoever.

In addition, Applicant claims in its present response to Opposer's Motion to Strike that "Likewise, the documents in Exhibit D,...are also proper to show the existence of various official PTO records." (See *Applicant's Opposition to Opposer's Motion to Strike*, pg. 3). However, in its Memorandum of Law in Opposition to Opposer's Motion for Summary Judgment, Applicant attempted to use Exhibit D as proof of the matter stated, specifically noting that "Third parties have used...trademarks and service marks that comprise the name 'Borghese.' (2nd Apicella Decl., Ex. D.)" (See *Applicant's Memorandum of Law in Opposition to Opposer's Motion for Summary Judgment*, pg. 7).

Finally, while it is true that the Board takes a more lenient stance regarding admissibility of evidence during the summary judgment phase of proceeding, the Board is not known for completely throwing away basic rules of evidentiary compliance. As shown above, Exhibits C and D of 2nd Apicella Declaration were submitted by Applicant for the truth of the matters stated and as such should be stricken as hearsay.

Conclusion

In light of the above, Opposer respectfully requests that its Motion to Strike Exhibits C & D of 2nd Apicella Declaration be granted in all respects.

Dated: April 29, 2010

BAKER AND RANNELLS, P.A.

By: 

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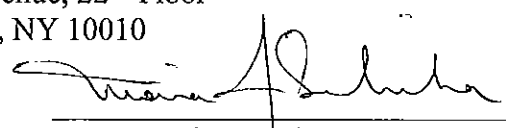
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE EXHIBITS C & D OF 2ND APICELLA DECLARATION in re: Borghese Trademarks, Inc. v. Multi Media Exposure, Inc., Opposition No. 91189629, was served on counsel for Applicant, this 29th day of April, 2010, by sending same via First Class Mail, postage prepaid, to:

Robert Raskopf, Esq., Claudia Bogdanos, Esq., Jolie Apicella, Esq.
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Moira J. Selinka